Supreme Court, U.S.
FILED
SEP 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-142

In the Supreme Court of the United States

OCTOBER TERM, 1987

SOUTH AFRICAN AIRWAYS, PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY,
DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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13pp

TABLE OF AUTHORITIES

Cases:	Page
Chew Heong v. *United States*, 112 U.S. 536 (1884)	9
Diggs v. *Shultz*, 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973)	8
United States v. *Lee Yen Tai*, 185 U.S. 213 (1902)	9
Weinberger v. *Rossi*, 456 U.S. 25 (1982)	9
Whitney v. *Robertson*, 124 U.S. 190 (1888)	8
Treaty, statutes and regulation:	
Agreement Relating to Air Services Between Their Respective Territories, May 23, 1947, United States-South Africa:	
61 Stat. 3057, T.I.A.S. No. 1639, 66 U.N.T.S. 233	2
Art. XI(D), 61 Stat. 3061	2, 8
4 U.S.T. 2205, T.I.A.S. No. 2870, 206 U.N.T.S. 334	2
19 U.S.T. 5193, T.I.A.S. No. 6512, 706 U.N.T.S. 287	2
Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086	2
§ 306, 100 Stat. 1100-1101	1, 2, 4, 6, 9
§ 306(a), 100 Stat. 1100	3, 5, 6
§ 306(a)(1), 100 Stat. 1100	3, 6
§ 306(a)(2), 100 Stat. 1100	3, 4, 5, 6
§ 306(a)(3), 100 Stat. 1100	4
§ 306(b), 100 Stat. 1100-1101	5
§ 306(b)(2), 100 Stat. 1100-1101	6
Federal Aviation Act of 1958 , 49 U.S.C. (& Supp. III) App. 1301 *et seq.*:	
§ 402, 49 U.S.C. (& Supp. III) App. 1372	2
§ 801, 49 U.S.C. (& Supp. III) App. 1461	4
Exec. Order No. 12,571, 3 C.F.R. 288	4

Miscellaneous: Page

132 Cong. Rec. (daily ed. Aug. 14, 1986):
p. S11712 ---------- 3, 7, 8
p. S11713 ---------- 7, 8
p. S11714 ---------- 7, 8
132 Cong. Rec. (daily ed. Sept. 29, 1986):
p. H8653 ---------- 7
p. H8661 ---------- 7
p. H8667 ---------- 7
p. H8668 ---------- 7
S. 2701, 99th Cong., 2d Sess. (1986) ---------- 3
S. Rep. 99-370, 99th Cong., 2d Sess. (1986) ------ 3

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Petitioner, the air carrier designated by South Africa to provide service between that country and the United States, contends that Section 306 of the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1100-1101, did not compel the immediate revocation of its permit to provide service to this country but instead allowed it to continue providing service for a full year until termination of the bilateral agreement governing air services between the two countries.

1. a. The United States exchanges commercial aviation operating rights with other countries through bilateral agreements. Typically, a bilateral agree-

ment extends to each of the contracting countries the right to designate one or more air carriers to serve specified routes between the two countries. The bilateral agreement between the United States and South Africa (Pet. App. 33a-62a)[1] extends route rights to a carrier to be designated by the South African government. Article XI(D) of the agreement (61 Stat. 3061) provides that it will terminate one year after either party gives notice of its intent to end the agreement (see Pet. App. 39a-40a).

Carriers designated by foreign countries to provide service to the United States must obtain a permit or exemption authority from the Department of Transportation before they can begin service (49 U.S.C. (& Supp. III) App. 1372). Petitioner, the only carrier designated by South Africa, had been providing scheduled air service between the United States and South Africa under a permit (see Pet. App. 63a-66a) issued in 1973 by the Department's predecessor, the Civil Aeronautics Board.

b. The Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, established a series of sanctions against the government of South Africa to encourage that government to end apartheid. Section 306 of the Act, 100 Stat. 1100-1101, is entitled "Prohibition on Air Transportation with South Africa." As reported from the Senate Foreign Relations Committee, Section 306 would have

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[1] Agreement Relating to Air Services Between Their Respective Territories, May 23, 1947, United States-South Africa, 61 Stat. 3057, T.I.A.S. No. 1639, 11 Bevans 501, 66 U.N.T.S. 233; amended 4 U.S.T. 2205, T.I.A.S. No. 2870, 206 U.N.T.S. 334; amended 19 U.S.T. 5193, T.I.A.S. No. 6512, 706 U.N.T.S. 287.

required only that the Secretary of State take steps to terminate the bilateral agreement between the United States and South Africa and that the Secretary of Transportation prohibit petitioner from operating to the United States *after* the agreement had terminated. S. 2701, 99th Cong., 2d Sess. § 306 (1986); see S. Rep. 99-370, 99th Cong., 2d Sess. 13-14 (1986). As noted above, termination of the agreement requires one year's advance notice.

What is now Section 306(a) of the Act was added to the bill on the Senate floor for the stated purpose of assuring the prompt revocation of petitioner's operating authority. In proposing the amendment, Senator Sarbanes noted that it was intended to assure that the "ban" on air service between the United States and South Africa "would take effect, if not immediately, at least in the very near future and not a year down the road." 132 Cong. Rec. S11712 (daily ed. Aug. 14, 1986).

Section 306(a) requires that the President "immediately notify the Government of South Africa of his intention to suspend the rights of any air carrier designated by the Government of South Africa under the [bilateral agreement]" (§ 306(a)(1), 100 Stat. 1100). It further provides that ten days after enactment the President is to "direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa to provide service pursuant to the Agreement" (§ 306(a)(2), 100 Stat. 1100).

On October 10, 1986, the Secretary of State gave the South African Ambassador one year's notice of the termination of the bilateral agreement by the United States (see Pet. App. 3a). The agreement will therefore terminate on October 10, 1987, and

petitioner's permit authority will then expire by its own terms (see *id.* at 65a).

On October 27, 1986, the President issued Executive Order No. 12,571, 3 C.F.R. 238 (Pet. App. 30a-32a), which (among other things) directed the Secretary of Transportation (the Secretary) to take the steps required by Section 306(a)(2) and (3) of the Anti-Apartheid Act. The Secretary revoked petitioner's permit on October 31, 1986 (Pet. App. 17a-25a). The Secretary's order explicitly considered and rejected petitioner's arguments that the Act did not contemplate revocation until the agreement had been terminated and that the bilateral agreement required her so to construe the Act (*id.* at 18a-22a).

After the President reviewed the Secretary's order pursuant to Section 801 of the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. III) App. 1461, and advised the Secretary that he would not disapprove it, and after the court of appeals and the Chief Justice denied stays (see Pet. 9), the revocation became effective on November 16, 1986 (see Pet. App. 25a n.2). On April 24, 1987, the court of appeals denied a petition for review of the Secretary's order (*id.* at 1a-16a).

2. a. This case presents no question of general importance that merits review by this Court. The proper construction of Section 306(a)(2) of the Anti-Apartheid Act affects exactly one air carrier: petitioner. Moreover, any remaining effect of that section on petitioner is severely limited: even if petitioner's construction of Section 306 were to prevail, it would be permitted to fly only until October 10, 1987, at which point the Air Transport Services Agreement and petitioner's permit will expire by their own

terms (as petitioner recognizes).[2] The question presented—whether, under a statutory provision that affects no other carrier, petitioner's right to provide air services between the United States and South Africa expired on November 16, 1986, or will expire on October 10, 1987—plainly does not require resolution by this Court.

b. Furthermore, the decision of the court of appeals is correct. Petitioner does not (and cannot) seriously contend that the Secretary and the court of appeals have misconstrued the intent of Congress in its enactment of Section 306(a)(2). Rather, petitioner contends that decisions of this Court require an approach to statutory interpretation under which Congress's clear intent will not be carried out unless Congress chooses the right magic words. There is no merit to petitioner's contention.

(1) The court of appeals properly concluded that Section 306(a) of the Anti-Apartheid Act constitutes an "unambiguous statutory mandate" requiring prompt revocation of petitioner's permit (Pet. App. 12a n.2). The sole purpose of Section 306(a)(2) was to assure that petitioner's operating authority would be revoked *before* the end of the one-year notice period under the bilateral agreement. The original Senate committee bill, now Section 306(b), would have led to the result sought by petitioner: the carrier would

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[2] See Letter from Thomas J. Whalen to Hon. Joseph F. Spaniol, Jr. (Aug. 25, 1987). In that letter, petitioner contends that the expiration of the bilateral agreement "will not affect the justiciability of this matter." We do not know of any reason why the expiration of the agreement will not render this matter moot, but in any event the scope of the question presented, whether or not it is technically moot, is so narrow that certiorari is not warranted.

have been authorized to serve the United States throughout the one-year notice period required for termination of the bilateral agreement. That result was unacceptable to the Senate.

The language of the statute indicates that Congress intended immediate revocation of petitioner's operating authority. Section 306(a)(1) required that the President "*immediately* notify the Government of South Africa of his intention to suspend" such service (emphasis added). Section 306(a)(2) required the President to act within ten days to direct the Secretary to revoke petitioner's permit. As the court of appeals observed (Pet. App. 9a), this "evident urgency" is totally inconsistent with petitioner's suggestion that Section 306 can be read to allow it to continue to operate for a full year.[3]

The congressional debates leading to the adoption of Section 306 also fully support the Secretary's interpretation. When Senator Sarbanes introduced the

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[3] Petitioner asserts (Pet. 17) that, because the Act does not specify a time limit within which the Secretary must revoke its authority, the one-year termination period in the bilateral agreement should control. Petitioner, however, does not provide any rationale for requiring the President to issue his direction to the Secretary within ten days if the Secretary was then expected to wait a full year until the termination of the bilateral agreement. Petitioner concedes (*ibid.*) that termination of the agreement under Section 306(b) and revocation of operating rights under Section 306(a) are "distinct acts," yet its interpretation would make Section 306(a)(2) a nullity. There would be no need to direct the Secretary to take action to revoke petitioner's permit on termination of the bilateral agreement, since the permit terminates by its own terms "upon the termination or expiration of the Air Transport Agreement" (Pet. App. 65a). Thus, if Section 306(a)(2) is to have any effect at all, it must be construed to require prompt revocation of petitioner's permit authority.

amendment, he stated that its purpose was to cause the early termination of petitioner's service (132 Cong. Rec. S11712 (daily ed. Aug. 14, 1986)):

> When the committee considered immediate sanctions and future sanctions to express our opposition to apartheid, the termination of air transportation was included among those that would be imposed immediately.
>
> * * * * *
>
> I think most Members assumed that in acting with respect to air travel, the committee was acting in a manner to ensure that the ban would take effect, if not immediately, at least in the very near future and not a year down the road.

In supporting the amendment, Senator Pell similarly stated: "[T]he committee's intention was to impose this sanction immediately. Adoption of the amendment will ensure that." 132 Cong. Rec. S11713 (daily ed. Aug. 14, 1986). As Senator Sarbanes added, "This is a sanction that all have regarded as meaningful and significant. To delay it for a year is to undercut what this body is seeking to accomplish." *Id.* at S11714.[4]

(2) Despite this clear congressional intent, petitioner contends that, because the revocation of its

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[4] The House of Representatives shared the Senate's understanding of the intent and effect of Section 306(a). During the debates leading to the override of the President's veto of the bill, the Members of the House who spoke on this subject noted that the bill would bring about a prompt cessation of air service. See, *e.g.*, 132 Cong. Rec. H8653 (daily ed. Sept. 29, 1986) (remarks of Cong. Dannemeyer); *id.* at H8661 (remarks of Cong. Tallon); *id.* at H8667 (remarks of Cong. Biaggi); *id.* at H8668 (remarks of Cong. Hubbard).

permit allegedly constituted a violation of the bilateral agreement, the court of appeals was required to reach a different result. That argument is incorrect.

We assume arguendo, as did the court of appeals, that the revocation of petitioner's permit constituted a violation of the obligations of the United States under the bilateral agreement.[5] Such a violation, however, would not undercut the clear meaning of Section 306(a). Congress may adopt legislation contrary to this country's obligations under a treaty or executive agreement. See, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888); *Diggs* v. *Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973). And, given Congress's clear intent to bring about prompt revocation, it is not relevant whether Congress intended to violate the bilateral agreement. "[I]t is wholly immaterial to inquire * * * whether such departure [from the agreement] was by accident or design * * *." *Whitney* v. *Robertson*, 124 U.S. at 195.

Nor does the involvement of an international agreement require courts to forsake accepted principles of

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[5] The United States Government has not yet taken a position on whether a violation has occurred. Some Members of Congress took the position (see 132 Cong. Rec. S11712 (daily ed. Aug. 14, 1986) (remarks of Sen. Sarbanes)) that it was proper to revoke petitioner's permit immediately notwithstanding Article XI(D) because the Republic of South Africa was in breach of the provision of the agreement that requires it "to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind" (Pet. App. 41a). Others took the contrary view that immediate termination would put the United States in breach of the agreement (see 132 Cong. Rec. S11713-S11714 (daily ed. Aug. 14, 1986) (remarks of Sen. Lugar)).

statutory construction. Petitioner contends that a court may look only at the language of the statute in question to determine whether it nullifies or supersedes a provision of an international agreement. Pet. 15 (citing *Weinberger* v. *Rossi*, 456 U.S. 25 (1982)). *Rossi*, however, demonstrates precisely the opposite. Far from slavishly adhering to the statutory language, this Court corrected the wording of the statute to reflect obvious congressional intent.[6] Moreover, rather than limit its consideration to the language of the statute, the Court in *Rossi* conducted a searching review of the legislative history of the provision in question to aid its determination of congressional intent (456 U.S. at 32-36). Similarly, in *Chew Heong* v. *United States*, 112 U.S. 536 (1884), which petitioner cites (Pet. 13, 15, 19), the Court declined to limit its consideration to the text of the statute in question, but conducted an extensive inquiry in an effort to ascertain congressional intent, including an application of "recognized rules of interpretation" (112 U.S. at 554).

United States v. *Lee Yen Tai*, 185 U.S. 213 (1902), on which petitioner relies (Pet. 14), is not to the contrary. That case stands for the unremarkable proposition that, when a statute and a treaty "are not absolutely irreconcilable," the courts should, "if possible," give effect to both (185 U.S. at 222). As noted above, however, the Secretary and the court of appeals properly found that petitioner's construction of Section 306 is simply not "possible" in light of Congress's clearly expressed intent.

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[6] The section in question in *Rossi* began with the phrase "'[u]nless prohibited by'" treaty. The Court, however, assumed that Congress meant to say, "'[u]nless provided by treaty.'" 456 U.S. at 29.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1987

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